FILED
United States Court of Appeals
Tenth Circuit

June 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUJUAN M. GIBSON,

Petitioner - Appellant,

v.

DAN SCHNURR,

Respondent - Appellee.

No. 22-3272
(D.C. No. 5:22-CV-03131-JWL-JPO)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

Jujuan Gibson, a Kansas prisoner, seeks a certificate of appealability (COA) to challenge the district court's order denying his habeas petition under 28 U.S.C. § 2254. Because reasonable jurists could not debate the district court's resolution of his constitutional claim, we deny Gibson's request for a COA and dismiss this matter.

Background

In 2019, the State charged Gibson with possessing with intent to distribute methamphetamine, cocaine, and marijuana. The charges stemmed from a traffic stop of a car in which Gibson was a backseat passenger. During the stop, officers searched the car

[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

and discovered two "grocery[-]style bags" that contained drugs directly behind Gibson's seat—one hidden in a compartment above the rear driver's side tire and another in a "natural factory void[]" above that same rear tire. App. 49. After the state trial court denied Gibson's motion to suppress, his case went to trial. The jury ultimately convicted Gibson on all three counts, and the trial court sentenced him to 98 months in prison.

Gibson appealed his convictions to the Kansas Court of Appeals (KCOA). As relevant here, Gibson asserted that the State presented insufficient evidence to support his convictions. The KCOA rejected his argument on the merits and affirmed his convictions. *State v. Gibson*, No. 123,064, 2021 WL 5027477, at *1 (Kan. Ct. App. Oct. 29, 2021). The Kansas Supreme Court denied review.

Gibson then filed the underlying § 2254 petition, reasserting his sufficiency claim. But the district court determined that Gibson failed to show—as he must to obtain federal habeas relief—that the KCOA's decision was either (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law" or (2) "based on an unreasonable determination of the facts." § 2254(d)(1)–(2). So the district court denied his habeas petition and his request for an evidentiary hearing. It also declined to issue a COA.

Analysis

Gibson now seeks to appeal the district court's order denying his habeas petition, but he must first obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A). We will issue a COA only if Gibson makes "a substantial showing of the denial of a constitutional right." § 2253(c)(2). To do so, Gibson must show "that reasonable jurists would find the district

court's assessment of the constitutional claim[] debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Gibson argues that reasonable jurists could debate the district court's resolution of his sufficiency claim. Federal habeas petitioners pressing sufficiency claims "face a high bar" because such claims "are subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). First, "[a] reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if *no* rational trier of fact could have agreed with the jury." *Id.* (emphasis added) (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam)). Second, on federal habeas review, a district court cannot "overturn a state[-]court decision rejecting a sufficiency . . . challenge simply because the federal court disagrees with the state court"; instead, the state court's decision must be "objectively unreasonable." *Id.* (quoting *Cavazos*, 565 U.S. at 2). In deciding whether to grant a COA, we must evaluate the debatability of the district court's resolution of Gibson's sufficiency claim through this doubly deferential lens. *See Dockins v. Hines*, 374 F.3d 935, 939–40 (10th Cir. 2004).

When a federal habeas petitioner raises a sufficiency challenge to a state conviction, state law determines the elements of the offense. *Hawes v. Pacheco*, 7 F.4th 1252, 1264 (10th Cir. 2021). Here, Gibson's convictions required the State to prove beyond a reasonable doubt that he possessed with the intent to distribute methamphetamine, cocaine, and marijuana. *See* Kan. Stat. Ann. § 21-5705(a). Gibson specifically challenges the evidence supporting possession, which the trial court defined as "[1] having joint or exclusive control over an item with knowledge of and the intent to

have such control or [2] knowingly keeping some item in a place where the person has some measure of access and right of control." App. 15. As the KCOA explained, "the Kansas Supreme Court has recognized that 'when a defendant is in nonexclusive possession of the premises on which illegal drugs are found, the mere presence of or access to the drugs, standing alone, is insufficient to demonstrate possession.'" *Gibson*, 2021 WL 5027477, at *11 (emphasis omitted) (quoting *State v. Rosa*, 371 P.3d 915, 919 (Kan. 2016)). But presence plus "other incriminating circumstances" linking the defendant to the drugs may establish constructive possession. *Id.* (quoting *Rosa*, 371 P.3d at 919). Such incriminating circumstances include: "prior participation in drug sales, use of drugs, proximity to the area where drugs are found, the drugs being found in plain view, and the defendant's incriminating statements or suspicious behavior." *Id.*

On direct appeal, Gibson asserted that he did not know there were drugs in the car and that the only evidence suggesting he possessed the drugs was his proximity to them. *Id.* But the KCOA disagreed, finding that the State presented other circumstantial evidence connecting him to the drugs. *Id.* For example, the officer testified at trial that he noticed an "overwhelming" smell of marijuana when he approached the car. *Id.* He also testified that as he began questioning the driver, it was Gibson, not the driver, who responded and asked why they were stopped. *Id.* at *1, 11. And when the officer then asked the driver where they were coming from, Gibson again responded for the driver, stating that they were visiting friends up the road. *Id.* at *1. Yet neither Gibson nor anyone else in the car would answer basic follow-up questions about their specific travel history; the most they revealed was that they were on the way to Kentucky from Arizona.

Id. And when the officer then asked who the car belonged to, Gibson would not directly answer the question; instead, he told the officer to check the car's tag, which revealed that the car was registered to the driver. *Id.* at *2. The officer later found two bills of sale for the car—one dated July 29, 2019, listing Gibson as the owner and a second dated August 4, 2019, listing the driver as the owner. *Id.* at *2, 11. The KCOA determined that, viewing this evidence in the light most favorable to the State, a rational jury could conclude that Gibson "was both aware of the drugs and exercised some form of dominion or control over the[m]." *Id.* at *11.

Moreover, the KCOA continued, the State presented other circumstantial evidence discovered on a phone seized during the search that linked Gibson to drug distribution. *Id.* Specifically, the State read text messages to the jury that "established that the user of the phone identified himself as [Gibson] and participated in likely drug transactions." *Id.* The State also admitted into evidence several pictures found on the phone that showed "large quantities of money and marijuana packaged in such a way to suggest a drug[-]distribution network." *Id.* Notably, one such picture was a selfie of Gibson holding cash. *Id.* at *4. Although this evidence did not necessarily tie Gibson to the specific drugs found in the car, the KCOA determined that a rational jury could infer from this evidence of prior drug dealing, along with all the other evidence presented, that he constructively possessed the drugs at issue here. *Id.* at *11–12. The KCOA therefore affirmed Gibson's convictions. *Id.* at *12.

After reviewing the trial evidence, the district court found nothing unreasonable about the KCOA's decision. More than that, the district court "agree[d] with the KCOA

that the evidence" just described—albeit circumstantial—was sufficient for a rational jury to find beyond a reasonable doubt that Gibson possessed the drugs in the car with the intent to distribute them. App. 170. In arguing otherwise in his application for a COA, Gibson in essence challenges the circumstantial nature of the evidence and the inferences drawn by the jury from that evidence.[1] For example, he highlights that there is no evidence he ever reached for the drugs; that no one ever saw him use the phone found in the car; that the text messages and pictures on the phone did not definitively point to prior drug dealing; and that there was nothing suspicious about him answering for the driver or failing to answer basic travel questions. But as the district court explained, circumstantial evidence alone can support a criminal conviction. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."). And it is the jury's job to "draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). What's more, on habeas review, the question is "not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—'a substantially higher threshold for a prisoner to meet.'" *Shoop v. Twyford*, 142 S. Ct. 2037,

[1] To the extent that Gibson argues that the trial court erred under Kansas law in admitting the evidence found on the phone without giving a limiting instruction to ensure the jury would not use it as propensity evidence, we decline to consider that argument. Gibson's assertion of state-law error—which, we note, he did not present to the KCOA—"provide[s] no basis for federal habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 68 n.2 (1991); *see also id.* at 68 ("[F]ederal habeas corpus relief does not lie for errors of state law." (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990))).

2043 (2022) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). Given the evidence presented and the two layers of deference that apply to sufficiency challenges in federal habeas proceedings, reasonable jurists could not debate the district court's conclusion that the KCOA's decision was objectively reasonable. So Gibson is not entitled to a COA.[2]

Conclusion

Because reasonable jurists could not debate the district court's decision denying Gibson's § 2254 petition, we deny his request for a COA and dismiss this matter.

Entered for the Court

Nancy L. Moritz
Circuit Judge

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[2] This conclusion dooms Gibson's request for an evidentiary hearing. *See Smith v. Aldridge*, 904 F.3d 874, 886 (10th Cir. 2018) ("[W]e can only order evidentiary hearings if the petitioner meets the requirements in *both* §[] 2254(d) and (e)(2). . . . After all, so long as § 2254(d)'s disallowance of relief continues to apply, federal courts *cannot consider* any evidence developed at an evidentiary hearing.").